In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 78

BINGHAMTON CONSTRUCTION CO., INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

Having already filed its petition for certiorari in *United States* v. *Binghamton Construction Co., Inc.*, October Term, 1953, No. 65, the Government, in the event that petition is granted, does not oppose the granting of a writ of certiorari on the cross-petition in No. 78, limited to the issues as to alleged wage representations arising from the standard building contract provision for minimum wages required to be included by the Davis-Bacon Act.

1. The Government believes that any judgment in favor of cross-petitioner was erroneous, for the

reasons set forth in its petition in No. 65, and that the contentions of cross-petitioner proceed on faulty premises and are without merit.[1] However, it does not oppose review of the issues as to alleged wage representations presented in No. 78, so that a full review may be had of the effects of the minimum wage schedule of the Secretary of Labor. The court below held that it constituted a warranty that the contractor would be able to obtain workers at the minimum rates prescribed by the Secretary and was not solely to protect workers against substandard wages. The importance of this question in Government construction contracts has been shown in our petition in No. 65.

2. The other questions presented by the cross-petition in No. 78 are unrelated to the wage claims, peculiar to the contract in question, and of no general importance.

A. The cross-petitioner seeks payment for sheeting and shoring not furnished. Interpreting the specification that sheeting and shoring "be measured by the square foot of protected area" (R. 11),

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[1] Petitioner claims that the contract was "void *ab initio*" because the Government did not properly determine the schedule of minimum wages under the Davis-Bacon Act. But the Davis-Bacon Act does not specify how wage rates should be determined. There was full compliance with the Labor Department's regulations, which did not confine the Department to its own files nor deny it the assistance of other agencies of the Government and access to their sources of information. In any event, how cross-petitioner would benefit if the contract were void *ab initio* by reason of an improper determination of minimum wages (Pet. in No. 78, p. 2) is left wholly to conjecture.

it claims that the total ground area occupied by buildings or other supported structures ought to be included rather than the face of the disturbed area against which the sheeting and shoring was placed for protection. In fact, cross-petitioner accepted payments computed on the latter basis during the progress of the work (R. 48-49, 69). The formula applied was reasonable and calculated to carry out the purpose of this provision of the contract. As the court below said, " * * * the purpose of this sheeting and shoring was to replace the natural support removed in the course of excavation. The ground area of a structure from which a portion of the natural support has been removed does not appear to have any reasonable relationship either to the amount or to the cost of providing the substitute support. Rather, the 'protected area' is the area of the surface laid bare by excavation such as the foundation wall of a building next to which sheeting is placed. Defendant computed it on this basis" (R. 70).

B. The court below, which was in an advantageous position to determine what the contract required by way of a suitable surface finish (R. 11), specifically found that "No more was required of plaintiff than was justified by the specifications" (R. 72). There is no occasion to review this determination which is special to this particular contract and case.

For the foregoing reasons, the United States does not oppose the granting of the petition for a writ of certiorari limited to the issues as to alleged representations concerning wages, but does oppose the granting of the writ on the other issues.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

SEPTEMBER 1953.

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